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Vishal Construction, Inc. and Local 79, Construction and General Building Laborers, Laborers' International Union of North America. Cases 29– CA–28866 and 29–CA–28968

July 8, 2009

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

The General Counsel seeks summary judgment in this case pursuant to the terms of a settlement agreement. On April 11 and June 2, 2008, respectively, Local 79, Construction and General Building Laborers, Laborers' International Union of North America (the Union) filed charges against Vishal Construction, Inc. (the Respondent), alleging that the Respondent violated Section 8(a)(3) and (1) of the Act.

Subsequently, the Respondent and the Union entered into a settlement agreement, which was approved by the Acting Regional Director for Region 29 on June 27, 2008. Among other things, the settlement agreement required the Respondent to (1) post a notice to employees regarding the complaint allegations; (2) make Derrell Winfrey whole by paying him the amount set forth in the settlement agreement; and (3) comply with the terms of the notice, which includes a provision stating that the Respondent will offer reinstatement to Winfrey upon the resumption of the Respondent's project at Kaiser Park.

The settlement agreement also contained the following provision:

[I]n case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party/Respondent, the Regional Director may issue a complaint based upon the allegations of the charge(s) in the instant case(s) which were found to have merit, and/or reissue the complaint previously filed in the instant case(s). Thereafter, the General Counsel may file a Motion for Summary Judgment with the Board on the allegations of the just issued complaint concerning the violations of the Act alleged therein. The Charged Party/Respondent understands and agrees that the allegations of the aforementioned complaint may be deemed to be true by the Board, that it will not contest the validity of any such allegations, and the Board may enter findings of fact, conclusions of law, and an Order on the allegations of the aforementioned complaint. On receipt of said Motion for Summary Judgment, the Board shall issue an Order requiring the Charged

Party/Respondent to show cause why said Motion of the General Counsel should not be granted. The only issue that may be raised in response to the Board's Order to Show Cause is whether the Charged Party/Respondent defaulted upon the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party/Respondent, on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is customary to remedy such violations, including, but not limited to the remedial provisions of this Settlement Agreement.

By letter dated March 12, 2009, counsel for the General Counsel advised the Respondent that the Region had been presented with evidence that the Respondent had resumed its project at Kaiser Park and that Derrell Winfrey had not been offered reinstatement as required by the settlement agreement. The letter stated that the Charging Party asserted that the Respondent has breached the settlement agreement and requested a response by March 18, 2009. By letter dated March 20, 2009, having received no response from the Respondent, counsel for the General Counsel advised the Respondent that unless the Respondent cured the breach of the settlement agreement within 7 days, the General Counsel would file a motion for summary judgment with the Board. The Respondent failed to comply. Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, on April 7, 2009, the Regional Director for Region 29 issued an Order revoking settlement, and consolidating cases, consolidated complaint and Motion for Summary Judgment, alleging that the Respondent has violated Section 8(a)(3) and (1) of the

On April 23, 2009, the General Counsel filed a Motion for Summary Judgment with the Board. Thereafter, on April 28, 2009, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no timely response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Summary Judgment¹

According to the uncontroverted allegations in the Motion for Summary Judgment, the Respondent has failed to comply with the terms of the settlement agreement by failing to offer Derrell Winfrey reinstatement after the Respondent resumed its operations at the Kaiser Park jobsite.² Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that all of the allegations in the consolidated complaint are true.³ Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a domestic corporation, with its principal office and place of business located at 73-12 35th Avenue, #F63, Jackson Heights, New York (the Jackson Heights facility), has been engaged as a general contractor in the construction industry.

During the 12-month period preceding the issuance of the consolidated complaint, a representative period, the Respondent, in conducting its business operations described above, performed services valued in excess of \$50,000 for the New York City Department of Parks and Recreation, including at a jobsite located in Kaiser Park, Coney Island, New York (the Kaiser Park jobsite).

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Local 79, Construction and General Building Laborers, Laborers' International Union of North America is a labor organization within the meaning of Section 2(5) of the Act.

³ See *U-Bee, Ltd.*, 315 NLRB 667 (1994).

II. ALLEGED UNFAIR LABOR PRACTICES

- 1. At all material times, Benny (last name unknown) has held the position of foreman, and has been a supervisor of the Respondent, within the meaning of Section 2(11) of the Act, and an agent of the Respondent acting on its behalf.
- 2. About March 26, 2008, the Respondent, by its agent, Benny (last name unknown), at the Kaiser Park jobsite, directed employees not to speak about their wages, hours, and other terms and conditions of employment with union agents.
- 3. About March 27, 2008, the Respondent terminated its employee Derrell Winfrey.
- 4. Since about March 27, 2008, the Respondent has failed and refused to reinstate, or offer to reinstate, Winfrey to his former position of employment.
- 5. The Respondent engaged in the conduct described above in paragraphs 3 and 4 because Winfrey sought to select the Union as his collective-bargaining representative, and because of his sympathies for, membership in, and activities on behalf of the Union.
- 6. On a date presently unknown in April 2008, the Respondent ceased performing work at the Kaiser Park jobsite
- 7. On a date presently unknown in February 2009, the Respondent resumed performing work at the Kaiser Park jobsite.
- 8. Since a date presently unknown in February 2009, the Respondent has failed and refused to reinstate, or otherwise offer, Derrell Winfrey employment in accordance with the settlement agreement.

CONCLUSIONS OF LAW

- 1. By the conduct described above in section II, paragraph 2, the Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.
- 2. By the conduct described above in section II, paragraphs 3–5, the Respondent has discriminated in regard to the hire or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(3) and (1) of the Act.
- 3. The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See Snell Island SNF LLC v. NLRB, __ F.3d 2009 WL 1676116 (2d Cir. June 17, 2009); New Process Steel v. NLRB, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed U.S.L.W. __ (U.S. May 27, 2009) (No. 08-1457); Northeastern Land Services v. NLRB, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

² There is no allegation that the Respondent has failed to comply with the remaining provisions of the settlement agreement.

found that the Respondent has violated Section 8(a)(3) and (1) by discharging Derrell Winfrey on March 27, 2008, we shall order the Respondent to make Derrell Winfrey whole for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful actions against him.

In this regard, we find that the backpay due Winfrey should not be limited to the amount specified in the settlement agreement.⁴ As set forth above, the settlement agreement provided that, in the event of noncompliance, the Board could "issue an Order providing a full remedy for the violations found as is customary to remedy such violations, including, but not limited to the remedial provisions of this Settlement Agreement." Thus, under this language, it is appropriate to provide the "customary" remedies of reinstatement, full backpay, expungement of the Respondent's personnel records, and notice posting.⁵

The additional backpay due Derrell Winfrey shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest thereon to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). However, because we shall order the Respondent to provide the customary remedy of full backpay, the applicable backpay period will commence on June 27, 2008, the day the Acting Regional Director approved the settlement agreement. We find it necessary to impose this limitation to prevent an unintended double recovery for the period running from the date that Derrell Winfrey was discharged to the effective date of the settlement agreement.

We shall also order the Respondent to offer Derrell Winfrey full reinstatement to his former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

Further, the Respondent shall be required to remove from its files any reference to the unlawful discharge of Derrell Winfrey, and to notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Vishal Construction, Inc., Jackson Heights, New York, its officers, agents, successors, and assigns, shall

See L. J. Logistics, Inc., 339 NLRB 729, 730 (2003).

- 1. Cease and desist from
- (a) Directing employees not to speak about their wages, hours, and other terms and conditions of employment with union agents.
- (b) Discharging or otherwise discriminating against any employee for supporting Local 79, Construction and General Building Laborers, Laborers' International Union of North America (the Union) or any other labor organization.
- (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Make Derrell Winfrey whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.
- (b) Within 14 days from the date of this Order, offer Derrell Winfrey full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
- (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Derrell Winfrey, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.
- (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
- (e) Within 14 days after service by the Region, post at its facility in Jackson Heights, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not al-

⁴ As noted above, there is no indication in the motion that the Respondent has failed to pay the sum of \$2400 to Derrell Winfrey under the terms of the settlement agreement covering backpay due from the date of Winfrey's discharge to the effective date of the settlement agreement. To the extent that the Respondent has paid this sum, the Respondent will be credited with any amount already paid.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 26, 2008.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 8, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber,

Member

(SEAL) NATIONAL LABOR RELATIONS BOARD APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT direct you not to speak about your wages, hours, and other terms and conditions of employment with union agents.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local 79, Construction and General Building Laborers, Laborers' International Union of North America or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Derrell Winfrey whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Derrell Winfrey full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Derrell Winfrey, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

VISHAL CONSTRUCTION, INC.